

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO.8689 OF 1992

WITH

SPECIAL CIVIL APPLICATIONS NO.14006 OF 1993,
11370 OF 1993, 430 OF 1992, 2171 OF 1992,
& 8446 OF 1992

For Approval and Signature

The Hon'ble Mr. Justice S.K. KESHOTE

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1. Whether reporters of local papers may be allowed to see the judgment ?
 2. To be referred to the reporters or not ?
 3. Whether their lordships wish to see the fair copy of the judgment ?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any order made thereunder ?
 5. Whether it is to be circulated to the Civil Judge?
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PATEL BHARATKUMAR DHULABHAI & ORS.

VERSUS

DISTRICT PRIMARY EDUCATION OFFICER, MEHSANA, & ORS.

Appearance:

In Special Civil Applications No.8689/92, & 430/92:
MR MK VAKHARIA for Petitioners
MS SIDDHI TALATI for Respondent No.1
None present for other Respondents

In Special Civil Applications No.8446/92, & 2171/92:
MR YS LAKHANI for Petitioners
MS SIDDHI TALATI for Respondent No.1
None present for other Respondents

In Special Civil Application No.11370/93

None present for Petitioner

MS SIDDHI TALATI for Respondent No.1

In Special Civil Applications No.14006/93:

MR MK VAKHARIA for Petitioners

MS SIDDHI TALATI for Respondent No.1

None present for other Respondents

Coram: S.K. Keshote,J

Date of decision:16.9.1997

ORAL JUDGMENT

#. In all these Special Civil Applications, common question of facts and law have arisen and as such, the same are being taken up for hearing together and are being disposed of by this common order.

#. In Special Civil Application No.11370 of 1993, notice was given to the petitioner for engaging another counsel as the counsel who has been engaged by him has been appointed as Judge, City Civil Court. Notice has been sent by the office but it has returned unserved with the report that the petitioner is not residing at the given address. In view of this report, there is no use to send fresh notice to the petitioner at the address aforesaid as it will meet with the same fate. This Special Civil Application was ordered to be heard with Special Civil Application No.430 of 1992 which is fixed for hearing today. In view of this fact, I do not find it to be advisable to send fresh notice to the petitioner and I consider the matter on merits.

#. The facts of the case are being taken from Special Civil Application No.8689 of 1992.

The petitioners in this Special Civil Application as well as cognate matters were possessing the qualification of Secondary School Certificate Examination (SSCE) plus special qualifications of C.P.Ed. or D.T.C. or T.C.W.C.G.. The District Primary Education Officer, Mehsana, vide advertisement dated 2.11.87 published in daily "Sandesh", invited applications for appointment of primary teachers. In response to the aforesaid advertisement all the petitioners in these Special Civil Applications submitted their applications. They were called for interview and ultimately what they stated is that they have been selected. On the Notice Board the

select list of the primary teachers has been placed and names of the petitioners figured in the select list.

#. The petitioners' case further is that they were called for interview vide letter dated 12.2.88 and were asked to remain present alongwith original certificates. As per the aforesaid letter, the original certificates were to be surrendered at the time of interview and those were to remain in the custody of the District Primary Education Officer. The petitioners submitted that their original testimonials etc. are still with District Primary Education Officer and as such they have been deprived to avail employment elsewhere also. From the select list aforesaid, appointments on the post of primary teachers were made in the month of December 1991 and after those appointments, 280 vacancies of primary teachers in Mehsana District still exist. It is the policy of the State Government to reserve 5% of the total number of primary teachers appointed for primary teachers having special qualifications like C.P.Ed., D.T.C., etc. Thus 5% reservation is to be provided for primary teachers having qualifications like D.T.C. and similarly 5% reservation is to be provided for the teachers having special qualification of C.P.Ed. etc. The petitioners' case is that out of the said select list, as many as 990 teachers are appointed and out of which 50 of each category of primary teachers, i.e. having qualifications like D.T.C., C.P.Ed. etc. were required to be appointed. However, only 20 teachers having the qualification of D.T.C. and 22 having qualification of C.P.Ed. were given appointment. Thus, from D.T.C. category, 30 more teachers are required to be appointed and from C.P.Ed. 28 teachers are yet to be given appointment. Instead of giving appointment to the petitioners, when the respondent has given fresh advertisement for making appointments, the petitioners have approached this Court. This advertisement is dated 13th October 1992. The applications were invited therein to fill up 300 posts of primary teachers.

#. Reply to the Special Civil Application has been filed by respondent-District Primary Education Officer and the claim of the petitioners has been contested.

#. The learned counsel for the petitioners contended that when reservation has been provided for special category of candidates and it has also specifically been notified in the notification, annexure 'B' dated 2.11.87, the appointments to the extent of this reservation should have been made. It has next been contended that the petitioners were selected for the post of primary

teachers and as such they acquired a right and the select list which has been prepared should have been given effect to instead of inviting fresh applications. Carrying further this contention, the learned counsel for the petitioners submitted that the petitioners were put in the select list and it could have been given go-by for some reasons, but no reasons are forthcoming from respondents not to act upon the said select list. The learned counsel for the petitioners urged that the select list has been acted upon but still to the extent of percentage prescribed for the special categories of teachers, it has not been acted upon by defendants. They lastly contended that by this time, the petitioners have become over-aged and in response to the advertisement of the year 1992 they cannot apply now. The original documents of the petitioners were taken by respondents and as such they have also been deprived of their chances of appointments elsewhere.

#. On the other hand, the learned counsel for the respondents contended that the petitioners have not indefeasible right of appointment merely because their names have been entered in the select list.

#. Mr.B.M.Patel, learned counsel for respondents No.1 and 2 urged that total vacancies available for recruitment in response to the advertisement dated 2.11.87 were found to be 504, i.e. 304 existing and 200 anticipated vacancies but appointments have been made of 706 candidates. It is, Shri B.M. Patel, learned counsel for respondents No.1 and 2 contended, an illegal action on the part of respondents. The appointments could have been only to the extent of the number of vacancies available and on the basis of that select list, no appointment could have been made against the vacancies which have arisen in future. He further submitted that as per recruitment rules, the qualification for appointment to the post of primary teachers in the District Panchayat are of S.S.C. and P.T.C.. There is no special qualification prescribed for these post of C.P.Ed., D.T.C. etc. However, the learned counsel for respondent-District Panchayat admits that the State Government has given out under the resolution, relied by the petitioners, certain reservation to be made for the candidates who are possessing the special qualifications aforesaid. On fact, Shri B.M.Patel, learned counsel for respondent-District Panchayat stated that the District Panchayat has made appointments from the category of candidates possessing qualification of certificate in Drawing, C.P.Ed. or Tailoring Certificate etc., the details of which have been given as under:

1. C.P.Ed. 17

2. D.T.C. 19

3. T.C.W.C.G. 17

The reservation as claimed by the petitioners is not binding as it has no statutory force. The appointments from the category of candidates having special qualifications have to be made only to the extent required. So far as the other contentions of learned counsel for petitioners are concerned, Mr.Patel submitted that the petitioners, after surrendering their original testimonials have not approached the District Panchayats for returning the same and as such no blame could have been placed upon the authorities. So far as contention of age relaxation is concerned, the learned counsel for respondent-District Panchayats submitted that the criteria as to age eligibility has to be strictly adhered to.

#. I have given my thoughtful considerations to the submissions made by learned counsel for the parties.

##. The recruitment and other service conditions of the primary teachers working in Primary School of Panchayats are regulated under the provisions of the Gujarat Panchayat Services (Recruitment of Primary Teachers) Rules, 1970 (hereinafter referred to as 'Rules 1970'). Before dealing with the contentions raised by learned counsel for the parties, I consider it to be appropriate to briefly notice the relevant provisions of the Rules 1970.

##. Rule 3 of the Rules 1970 makes a provision for preparation of estimates of vacancies by the Administrative Officer in the first week of March of each year, likely to arise in the District upto 31st August in the ensuing school year. In framing such estimates, the Administrative Officer is required to take into account the staff required under the scheme of expansion as well as for filling vacancies likely to occur on account of deputation of teachers to training colleges, likely increase in the number of pupils, transfer and retirement of teachers and such other circumstances. Thereafter steps are to be taken to invite applications so as to reach his office on or before 1st April from the qualifying candidates by giving advertisement in one or more local newspapers. Rule 4 of the Rules 1970 provides the qualification of the candidate, both of age

eligibility as well as academic qualification. A candidate must not be less than and more than the prescribed age limits and must have passed any one or more examinations, namely, Secondary School Certificate Examination of the Gujarat Secondary School Certificate Board together with a certificate of Primary Teachers' Certificate Examination, Primary School Certificate Examination together with a certificate of Primary Teachers' Certificate Examination or Lok Shala Certificate Examination together with a certificate of Primary Teachers' Certificate Examination. Rule 6 thereof lays down for maintenance of Register of qualified candidates. Rule 7 makes a provision for preparation of list of candidates and Rule 8 contains a provision of "lists how to be prepared and what to contain". Rule 11 deals with preparation of final list of selected candidates. Rule 13 and 14 relate to giving appointment to the candidates from the final list.

##. Having glanced at the relevant provisions of the Rules 1970, I am satisfied that in those Rules there is no provision whatsoever made by the Rule Making Authority for giving any reservation on the post of Primary Teachers to the candidates having qualifications of C.P.Ed. or D.T.C. or T.C.W.C.G. This reservation, on which heavy reliance has been placed by the learned counsel for the petitioners in these Special Civil Applications, had been given under the executive instructions. How far these executive instructions can nullify statutory Rules or be given effect to in the matters of appointment where there is a provision contrary to the Rules, is a larger issue and I do not consider it necessary in this case to go into all these questions any further. However, the fact is that the Rules nowhere provide for reservation whereas this reservation has been provided under the executive instructions, resolutions or circulars of the government. Further more, in the Rules only qualification prescribed for appointment as primary teacher is of S.S.C. with P.T.C. These special qualifications are not the qualifications laid down under the Rules of 1970 for appointment in the cadre. But it is a fact that under the government instructions, resolutions and circulars, reservation has been laid down for candidates possessing aforesaid special qualifications. In the notification inviting applications for appointment on the post of primary teachers, it has been mentioned that particular number of posts are reserved for the candidates having the aforesaid special qualifications. However, the learned counsel for the petitioners are unable to show any provision under the Rules or the Government

Resolutions that reservation as prescribed to the extent aforesaid, for the candidates possessing those special qualifications, is to be strictly adhered to. The reservation for these candidates cannot be equated with the reservation provided for Scheduled Caste/Scheduled Tribe candidates or candidates belonging to Baxi Panch communities for whom there are constitutional as well as legal reservations provided. The learned counsel for the petitioners however, is unable to satisfy this Court that in all the primary schools run by the District Panchayat special category posts are sanctioned. He is also unable to satisfy this Court on the point that under Rules of 1970 special category posts of primary teachers are sanctioned in these schools. So, it seems to be a case of administrative convenience to have teachers having special qualifications for teaching craft, drawing or physical education to the students of the primary schools.

##. In reply to the Special Civil Application, the respondents have come up with the case that the syllabus of the primary education does not include subject like drawing, tailoring, physical education, etc. and, therefore, in fact there is no need for teachers with special qualifications. It is further stated in the reply that such specially qualified teachers, who have been already appointed in the past are also in excess as their services can be utilised only in big primary schools. The total number of big primary schools in the District, as per the reply of the respondents, is only 119. As against this, according to the respondents, 119 special teachers for tailoring, 173 special teachers for drawing and 410 special teachers for physical education have already been appointed and they are working in Mehsana District as primary teachers of special subjects. In addition to those teachers in the special subjects, in pursuance of the selection in dispute, 17 teachers having qualification of C.P.Ed., 19 teachers having qualification of D.T.C. and 17 teachers having qualification of T.C.W.C.G. have been appointed. The respondents have given the total strength of primary teachers in Mehsana District and number of teachers recruited so far. If we go by the number of primary teachers having special qualifications, the total number of this category, inclusive of this selection, comes to 835. Looking to this sizeable number of teachers having special qualifications, it cannot be said that total disregard has been shown to the instructions, resolutions or circulars of the government prescribing reservation to the candidates having special qualifications in appointment in the cadre of primary teachers. If we go

by percentage to be taken for the candidates having special qualifications for appointment in the cadre, 835 teachers with these special qualifications are already there in the District and it cannot be said that the respondents have not given effect to the Govt. policy in the matters of appointment of Primary Teachers. So, if we go by this number it cannot be said that the respondents have not cared to give effect to the percentage prescribed for the candidates having special qualifications for appointment as primary teachers. Thus the requirement of teachers of special subjects who are not candidates holding P.T.C. qualification is not at all there, as per the case of the respondents. It is the case of the respondents that there is over staffing of such teachers looking to only 119 pay centres of big primary schools. The respondents' further case in the reply, which is uncontroverted, is that most of the candidates holding qualification of P.T.C. do possess qualifications of ATD, T.C.W.C.G., etc. and some of them are C.P.Ed. and Sangeet Visharat and if any need arises, for teachers of such subjects, even the qualified candidates holding P.T.C. qualification having such additional qualification are useful and they fulfil the requirement. From these uncontroverted facts it is clear that the teachers of special qualifications aforesaid are already there to the substantial extent of reservation provided of these categories and further in addition to them many of P.T.C. qualification teachers possess these qualification in addition also.

##. It is settled law that by mere inclusion of name of a candidate in the select list he does not acquire any indefeasible right to get appointment. Even if vacancies are available, merely because of empanelment in the select-list, successful candidates do not get any indefeasible right to get appointment. This right can be denied by the appointing authority legitimately. Reference in this respect may have to the decisions of the Honourable Supreme Court of India as well as this Court, detailed as under:

(1) 1991(3) SCC 47 Shankarsan Das v. Union of India

(2) AIR 1994 SC 736 State of Bihar v. Secretariat Assistant Successful Examinees Union

(3) JT 1996(1) SC 258 Union of India v. S.S.Uppal

(4) JT 1996(1) SC 271 State of Bihar v. Mohd
Kalauddin

(5) 1995(1) GLR 427 Rathore Jahabhai v.
State of Gujarat

(6) 1995(1) GLR 483 NS Misra v. AMC

(7) 1995(2) GLR 1640 Commissioner of Police
v. Santosh Vasant Mali.

##. It is also equally settled law that the appointing authority cannot make appointment in excess of the number of posts advertised. Reference in this respect may be had to the decision of the Honourable Supreme Court in the case of Prem Singh and others v. Haryana State Electricity Board reported in 1996(4) SCC 319. It is true that in the advertisement dated 2.11.1987 the respondents have not come out with the number of vacancies on which appointments are to be made. But it is obligatory on the part of the appointing authority to take out the number of existing as well as anticipated vacancies before it makes appointment on the posts advertised. So, even if the number of vacancies were not notified, it will not give a right to the appointing authority to fill up the vacancies to come into existence for all the years to come, by the candidates named in the panel prepared in response to the advertisement dated 2.11.1987. The term "Anticipated vacancies" does not mean those vacancies which are to be accrued in future years, but it means that vacancies which are likely to accrue within reasonable proximity of time from the date of advertisement inviting applications or within reasonable time from the date on which existing vacancies have been determined earlier to issuance of the advertisement for inviting applications.

##. In the reply to the Special Civil Application the respondents have come out with a clear case that there were 304 existing vacancies and 200 vacancies were estimated to be available by 30.9.1988. So, total vacancies, both existing and anticipated, were to be 504. These figures have been taken by the respondents earlier to the issuance of the advertisement. The Staff Selection Committee in its meeting dated 16.2.1988 had resolved to prepare a list of 700 candidates, but as against this a list of 1172 candidates was prepared. In this list of 1172, 900 candidates were of the category possessing qualifications of S.S.C. and P.T.C. and the rest of the candidates were of this special category. It

is not the case of the petitioners that any candidate who is placed lower in merits than them has been given appointment. Further, the petitioners have no right whatsoever to claim appointment beyond the number 504. If we go by the petitioners' own case then it is clearly borne out that 742 candidates of the said list have already been given appointment i.e. more than the vacancies which were available. Reference has also been made by the petitioners to the appointments given to the candidates belonging to Scheduled Caste/Scheduled Tribe. But that is not relevant in the present case.

##. The petitioners have not controverted the fact stated by the respondents that available vacancies for the recruitment from the applications received in pursuance of the advertisement dated 2.11.1987 were not more than 504. The respondents in fact have violated the law laid down by the Honourable Supreme Court by giving appointment to 742 candidates. Still, it will not give any right to the petitioners to get writ of mandamus issued against the respondents from this Court to give them appointment.

##. As stated earlier, it is not the case of the petitioners that any candidate, who is lower in merits than the petitioners, has been given appointment. But what the petitioners really intending is that the vacancies which have been accrued in the subsequent years should be given to them. That cannot be accepted and no such direction can be given by this Court. Otherwise, it will affect the fundamental rights of all the eligible candidates, guaranteed to them under Articles 14 and 16 of the Constitution of India. These 300 vacancies which are sought to be filled in by open selection, cannot be given to the persons whose names are in the select-list which has been prepared in pursuance of the advertisement dated 2.11.1987. This Court in exercise of powers under Article 226 of the Constitution of India, will not direct the respondent to act contrary to the recruitment rules as well as the constitutional mandate, as contained in Articles 14 and 16 of the Constitution of India. It cannot be said to be a case where any of the legal or fundamental rights of the petitioners are being infringed. At the most their grievance may be that the respondents have acted contrary to the rules and further they should have given appointment to the petitioners.

##. Lastly, it may be mentioned that this list has been prepared in the year 1988 and we are in the year 1997. I do not find any justification in the grievance made by the petitioners for giving appointment on the basis of

the said list which has been prepared about nine years back. From the facts of this case, I find that the fresh list has already been prepared of the candidates to be given appointment in response to the advertisement of the year 1992. However, that list cannot be given effect to as this Court has granted interim relief. During the course of arguments a point has been raised that even if the relief is not granted to the petitioners, then atleast those petitioners who have become overaged, the respondents should give age relaxation to them in the next selection. I have examined this aspect of the matter and I do not find any justification to give such direction in the present case as the scheme of the Rules is very clear and the appointments from the list prepared are to be restricted to the vacancies which have been determined. Law has now been well settled that the appointments have to be restricted to only the number of vacancies as advertised. The vacancies which are subsequently created have to be filled in by fresh selection and not by the same list, otherwise, it will infringe the right of consideration for appointment in public employment, of the candidates who acquire eligibility subsequently. Those candidates who have been selected and their names are there in the select list prepares in response to the advertisement of the year 1992 cannot be asked to make room for these persons or in case such relaxation is granted, then what this Court will give eligibility to the persons who otherwise are not eligible for appointment on the post of primary teachers. Entitlement of relaxation can be there only to the extent as provided in the statutory rules and merely because these persons have chosen to file these Special Civil Applications, it cannot be said to be desirable as well as in accordance with law to give them age relaxation. Sitting under Article 226 of the Constitution of India, this Court should not give such direction which may be contrary to the statutory rules. In view of this fact, I do not find any ground to give any relaxation in the age eligibility as laid down in the Rules 1970 for the appointment to the post of primary teachers.

##. Taking into consideration the facts of the case I do not find any merits in this Special Civil Application and the same is dismissed. Rule discharged with no order as to costs. Interim relief, if any, granted by this Court stands vacated.

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(sunil/prasad)